Rescuecom Corporation v. Google, Inc. Doc. 15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RESCUECOM CORPORATION, Plaintiff, vs. GOOGLE, INC. Defendant.	5:04-CV-1055 (NAM)(GHL)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT GOOGLE INC.'S MOTION TO DISMISS

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Defendant Google Inc., by and through its undersigned counsel Hunton & Williams LLP, respectfully submits this Reply Memorandum of Law in Further Support of its Motion to Dismiss.

I. INTRODUCTION

In its opening brief, filed on November 8, 2004, Google cited a plethora of cases demonstrating that Rescuecom's complaint fails to allege "use" within the meaning of trademark law. The Second Circuit's subsequent June 27, 2005 decision in *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir.), *cert. petition filed* (Sept. 21, 2005), simplifies matters considerably, by validating the points raised by Google in its opening brief.

Rescuecom's opposition almost entirely ignores the *1-800 Contacts* decision, which was issued twelve weeks before Rescuecom filed its opposition brief.[1] The *1-800 Contacts* decision confirms that: (1) trademark use is a distinct element of Rescuecom's trademark claims; (2) allegations of a likelihood of consumer confusion do not satisfy the trademark use element; and (3) internal utilization, not communicated to the consumer, of a trademark to trigger display of advertisements does not qualify as "use" within the meaning of the Lanham Act.

Rescuecom has not alleged and cannot allege trademark use. Its complaint should be dismissed with prejudice.

II. ARGUMENT

A. Rescuecom's First Count, for Trademark Infringement, Must Be Dismissed Because Rescuecom Has Not Alleged and Cannot Allege Trademark Use

1. Rescuecom has not alleged and cannot allege trademark use

The Second Circuit recently reiterated that trademark use is, in fact, a separate element of

[1] Rescuecom's sole reference to this case is in a string citation on page 10 of its opposition brief. Instead, Rescuecom's opposition relies heavily upon cases decided in the Ninth Circuit and Eastern District of Virginia to support its trademark infringement claims, despite the existence of controlling authority in the Second Circuit.

a cause of action for trademark infringement. "In order to prevail on a trademark infringement claim . . . a plaintiff must establish that (1) it has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) 'in connection with the sale . . . or advertising of goods or services,' 15 U.S.C. § 1114(1)(a), (5) without the plaintiff's consent." *1-800 Contacts,* 414 F.3d at 406-07.[2] By "use," the Second Circuit means that a *trademark* use is required. *See id.* at 412 (criticizing decisions that "seemingly based a finding of *trademark 'use'* on the confusion such 'use' was likely to cause" (emphasis added)).

In discussing the "use" element, the Second Circuit expressly stated that it found the "thorough analyses" in the district court decisions *U-Haul Int'l, Inc. v. WhenU.com, Inc.,* 279 F. Supp. 2d 723 (E.D. Va. 2003), and *Wells Fargo & Co. v. WhenU.com, Inc.,* 293 F. Supp. 2d 734 (E.D. Mich. 2003), to be "persuasive and compelling." 414 F.3d at 408. Thus, although Rescuecom boldly proclaims that "[n]either the *U-Haul* case, nor the *Wells Fargo* case has ever been followed or cited with approval by any other court" (Mem. of Law in Opp. to Def. Google Inc.'s Mot. to Dismiss All Claims ("Opp.") at 10), the truth is that the Second Circuit has done just that. Not only is trademark use a separate element of a Lanham Act claim, but "'use' must be decided as a threshold matter because, while any number of activities may be 'in commerce' or create a likelihood of confusion, no such activity is actionable under the Lanham Act absent the 'use' of a trademark." *1-800 Contacts,* 414 F.3d at 412.

In *1-800 Contacts,* the Second Circuit noted that "WhenU does not 'use' 1-800's trademark in the manner ordinarily at issue in an infringement claim: it does not 'place' 1-800 trademarks on any goods or services in order to pass them off as emanating from or authorized

[2] The plaintiff must also show that the "defendant's use" of that mark is likely to cause confusion regarding the affiliation, connection, or association of the defendant with the plaintiff, or regarding the origin, sponsorship, or approval of the defendant's goods, services, or commercial activities by the plaintiff. *Id.* at 407.

by 1-800." *Id.* at 408. Similarly, Rescuecom does not allege that Google places Rescuecom's trademarks on any Google services in an attempt to pass them off as coming from Rescuecom.

Rescuecom has not pled and cannot plead that the ads that appear when users search for "rescuecom" necessarily do so because each of the advertisers has selected "rescuecom" as a keyword trigger for its ad. *See id.* at 410 (noting difficulties with the plaintiff's Lanham Act claim, including that the plaintiff's "website address is not the only term . . . that could trigger a Vision Direct ad to 'pop up' on 1-800's website").[3] Instead, Rescuecom alleges that *at least some* of the allegedly infringing ads have appeared when users search for "rescuecom" because advertisers have selected its trademark as a keyword trigger for AdWords ads (Compl. ¶ 26). That internal utilization, however, has been flatly rejected by the Second Circuit as the basis for a Lanham Act claim: "A company's internal utilization of a trademark in a way that does not communicate it to the public . . . simply does not violate the Lanham Act . . . ." *Id.* at 409. In order to survive a motion to dismiss, then, Rescuecom must be able to point to utilization of its trademark in a manner that *is* communicated to the public. This is has not, and cannot, do.

Rescuecom points to a host of factors that it claims distinguishes the case at bar from the *WhenU.com* district court cases. *See* Opp. at 10-11. Had Rescuecom chosen to address the Second Circuit's decision in *1-800 Contacts,* it presumably would have pointed to these same issues. The Second Circuit's holding, however, is that "internal utilization" of a mark, not communicated to the consumer, is not a "use" within the meaning of trademark law. 414 F.3d at

[3] In fact, ads in the AdWords program can be triggered in a variety of ways, including through use of matching options that do not require that the keyword selected be part of the search user's query. This fact is obviously beyond the pleadings, and Google is not asking that the Court explicitly rely on these facts or that it convert Google's motion into a motion for summary judgment. Instead, these facts are merely mentioned to illustrate that Rescuecom does not allege that ads that appear when users search for "rescuecom" necessarily do so because each and every one of the advertisers selected "rescuecom" as a keyword.

409. When Google displays ads after a user enters a search query, it does not inform the user whether those ads appear (1) because the advertisers selected the user's search query (or some portion of it) as a keyword; (2) because the user's query (or some portion of it) has been algorithmically deemed similar to the keyword selected by the advertisers; or (3) for some other reason altogether. Given that similarity, any purported differences between this case and the *1-800 Contacts* case are of little import.

The situation in the case at bar is analogous to one in which a consumer walks down an aisle in a drugstore, and notices that a competitor's pain reliever has been placed prominently alongside the leading brand. The consumer may wonder whether that placement was intentional. The consumer may even assume (possibly correctly) that the competitor paid the store to place its competing pain reliever next to the leading brand. "Indeed, it is routine for vendors to seek specific 'product placement' in retail stores precisely to capitalize on their competitors' name recognition." *Id.* at 411. The Second Circuit has explicitly rejected the argument that such conduct violates trademark law.[4]

Or, to use a different analogy,

> Consider the following scenario: I walk into Macy's and ask for the Calvin Klein section and am directed upstairs to the second floor. Once I get to the second floor, on my way to the Calvin Klein section, I notice a more prominently displayed line of Charter Club clothes, Macy's own brand, designed to appeal to the same people attracted by the style of Calvin Klein's latest line of clothes.

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[4] It is thus irrelevant that Rescuecom alleges that selection by its competitor of its trademark as a keyword trigger for the display of advertisers "allows Google and Rescuecom's competitors to financially benefit from and to trade off the goodwill and reputation of Rescuecom Corporation." Compl. ¶ 32; *see 1-800* Contacts, 414 F.3d at 411; *see also Wells Fargo,* 293 F. Supp. 2d at 761 ("In accusing WhenU of 'free riding' on their trademarks, plaintiffs ignore the fact that trademark laws are concerned with source identification. They are not meant to protect 'consumer good will (sic) created through extensive, skillful, and costly advertising.'" (quoting *Smith v. Chanel, Inc.,* 402 F.2d 562, 566 (9th Cir. 1968)); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?,* 54 Emory L.J. 461, 478-81 (2005) (criticizing as "circular and ultimately empty" the reliance on "unjust enrichment" and "free riding" theories based on a trademark holder's goodwill).

> Let's say I get diverted from my goal of reaching the Calvin Klein section, the Charter Club stuff looks good enough to me, and I purchase some Charter Club shirts instead. Has Charter Club or Macy's infringed Calvin Klein's trademark, simply by having another product more prominently displayed before one reaches the Klein line? Certainly not.

Playboy Enterprises, Inc. v. Netscape Comms. Corp., 354 F.3d 1020, 1035 (9th Cir. 2004) (Berzon, J., concurring).

Google's internal decisions regarding what ads to display in response to a user's query, including decisions to show ads because advertisers have selected "rescuecom" as a keyword trigger, are not "uses" within the meaning of trademark law. Consequently, Rescuecom's trademark infringement claim must be dismissed.

2. Any alleged confusion cannot save Rescuecom's infringement claim

Rescuecom's failure to allege a "trademark use" dooms its trademark infringement claim, and Rescuecom cannot cure this defect by relying on allegations of consumer confusion. According to Rescuecom, users viewing these competitors' ads may believe the ads are related to or sponsored by Rescuecom. Compl. ¶ 33; *see also* Opp. at 15-19.[5] However, this alleged confusion cannot serve as a basis for concluding that Rescuecom has satisfactorily pled trademark use. As the Second Circuit put it, "this rationale puts the cart before the horse." *1-800 Contacts*, 414 F.3d at 412 (criticizing *Bihari v. Gross,* 119 F. Supp. 2d 309 (S.D.N.Y. 2000), and *GEICO v. Google Inc.,* 330 F. Supp. 2d 700 (E.D. Va. 2004), as "cases in which the court seemingly based a finding of trademark 'use' on the confusion such 'use' was likely to cause"). Instead, the Court must first find that there has been an actionable trademark use before even addressing the likelihood of confusion. "[W]hile any number of activities may . . . create a likelihood of confusion, no such activity is actionable under the Lanham Act absent the 'use' of a

[5] Google disputes these claims, but the Court must accept them as true for purposes of this motion.

trademark." 414 F.3d at 412.

This conflation of "confusion" and "use" is the fundamental flaw in Rescuecom's opposition. Reduced to its essence, Rescuecom's argument is that the Court should find that it has alleged "use" because it has alleged that some Internet users, after searching for "rescuecom," may have chosen to click on links leading to competitors' websites instead of Rescuecom's website. *See* Opp. at 11-12 (discussing *People for the Ethical Treatment of Animals ("PETA") v. Dougney,* 263 F.3d 359 (4th Cir. 2001), and similar cases). Rescuecom argues that the *PETA* court held that PETA's trademark had been "used" because some users were prevented from accessing the plaintiff's services by their confusion in accessing the defendant's website, which had a nearly identical web address. Under the Second Circuit's analysis in *1-800 Contacts,* however, this misses the mark. *1-800 Contacts,* 414 F.3d at 412 ("'use,' 'in commerce,' and 'likelihood of confusion' [are] three distinct elements of a trademark infringement claim").

In *1-800 Contacts,* the Second Circuit rejected the plaintiff's attempt "to bootstrap[] a finding of 'use' by alleging other elements of a trademark claim." *Id.* at 412. Rescuecom's failure to allege "use" requires dismissal of its trademark infringement claim.

3. Rescuecom's discussion of comparative advertising is irrelevant to this motion

Rescuecom also spends a considerable portion of its brief addressing an argument that Google did not make. Opp. at 13-15. While the "comparative advertising" defense may be relevant should the Court deny the present motion to dismiss, Google is not relying on this defense to support this motion. Simply put, no such defense is needed, because Rescuecom, by failing to allege a trademark use, has failed to plead a prima facie case.

B. Rescuecom's Second Count, for False Designation of Origin, Fails Because Rescuecom Has Not Alleged Trademark Use, Has Not Pled That Users Are Likely to Be Deceived, and Has Not Pled a False Designation

Rescuecom's false designation of origin claim fails due to the lack of any alleged trademark use. *See Interactive Prods. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 695 (6th Cir. 2003) (without "trademark use," "false designation of origin laws do not apply"). Additionally, as Google pointed out in its opening brief (Mem. of Law in Supp. of Def. Google Inc.'s Motion to Dismiss ("Opening Mem.") at 10), and as Rescuecom failed to address in its opposition, the claim also fails because Rescuecom has pled only that consumers "may" be deceived (Compl. ¶ 59), while the Lanham Act requires that consumers are *likely* to be deceived. 15 U.S.C. § 1125(a)(1)(A).

Moreover, leaving aside the failure to plead "use" and the failure to plead a *likelihood* of deception, Rescuecom simply has not adequately pled a *false designation* – another point raised in Google's opening brief (Opening Mem. at 10) and ignored by Rescuecom's opposition. Rescuecom's false designation claim hinges on its assertion that "Internet Users who search using the term 'Rescuecom' on defendant Google's Internet Search Engine have a reasonable expectation that the websites and hyperlinks appearing on defendant Google's Search Result Page are related to plaintiff Rescuecom Corporation." Compl. ¶ 58. Only from this allegation could one even theoretically reach the conclusion, necessary to the false designation claim, that there has been a misrepresentation as to the source of goods or services. *See Archie Comic Publications, Inc. v. Decarlo,* 141 F. Supp. 2d 428 (S.D.N.Y. 2001) ("misrepresentation of source is an essential element of the claim").[6] Rescuecom's allegation, however, presupposes one of the very legal conclusions it needs to support its false designation claim. As such, the Court need not accept it as true, even on a motion to dismiss. *See In re American Express Co. Shareholder Litig.*, 39 F.3d 395, 400-01 n.3 (2d Cir. 1994).

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[6] Indeed, even if the Court were to accept this conclusory assertion, a presumption that the sponsored links on the search result page are "related" to Rescuecom Corporation is not the same as a presumption that the websites linked to by the sponsored links originate with Rescuecom Corporation.

The *factual* allegations in the complaint simply do not support the conclusion that consumers are entitled to assume that if they search for "rescuecom" using the Google search engine, everything on the resulting web page will be "related to plaintiff Rescuecom Corporation." Compl. ¶ 58. At best, consumers might reasonably expect that the links on the search result page are topically related to their query ("rescuecom"), rather than specifically affiliated with Rescuecom Corporation. Rescuecom has not adequately pled that there has been a false representation that the links in question originate with Rescuecom Corporation.[7]

Rescuecom has failed to plead trademark use, a likelihood of deception, or a false designation. As a result, Rescuecom's false designation claim must be dismissed.

C. Rescuecom's Third, Fourth and Fifth Counts, Alleging Federal Dilution, Common Law Trademark Infringement, and State Law Dilution All Fail Based on the Lack of Trademark Use

As noted in Google's opening brief, Rescuecom's claims alleging Lanham Act dilution, common law trademark infringement, and state law dilution each also require trademark use. *See* Opening Mem. at 11 (citing *Pirone v. MacMillan, Inc.*, 894 F.2d 579 at 581-82, 583 (2d Cir. 1990) (dismissing common law infringement claim in addition to Lanham Act infringement claim based on lack of "trademark use"); 15 U.S.C. § 1125(c)(1) (dilution claim requires "use"

[7] Indeed, to rule otherwise would raise troubling First Amendment questions. If placing links on a search result page in response to a search query consisting of a trademark is tantamount to a representation that the links originate with the trademark owner, search engines would be precluded from displaying other links that they believe to be related to the query, whether as sponsored links or as unpaid web search results. *Cf. Search King, Inc. v. Google Technology, Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003) (holding that "a representation of the relative significance of a web site as it corresponds to a search query is a form of protected speech" under the First Amendment).

of the mark by the defendant); N.Y.S. Gen. Bus. Law § 360-l (injunctive relief requires proof of infringement)). While Rescuecom maintains that it has alleged "use" within the meaning of trademark law, it does not dispute that "use" is an essential element of these claims. For the reasons expressed above, Rescuecom has not alleged and cannot allege "use" within the meaning of trademark law, and thus its claims for Lanham Act dilution, common law trademark infringement, and state law dilution must also be dismissed.

D. Rescuecom's Sixth and Final Count, Alleging Tortious Interference with Prospective Economic Advantage, Must Be Dismissed for Failure to Allege a Specific Lost Business Relationship, and for Failure to Allege a Wrongful Act

Rescuecom incorrectly asserts that it "need not allege or even prove at trial that it would have entered into a valid contract with any particular consumer but for Defendant's action." (Opp. at 21.) New York law is directly to the contrary, requiring allegations sufficient to "support a finding that [the plaintiff] would have executed *specific contracts* but for the interference by [the defendant]." *Riddell Sports v. Brooks,* 872 F. Supp. 73, 79 (S.D.N.Y. 1993) (emphasis added). Similarly, reversing the denial of a motion to dismiss, the First Department in *Vigoda v. DCA Prods. Plus Inc.*, 741 N.Y.S.2d 20 (1st Dep't 2002), held that "[a]s plaintiffs cannot *name the parties to any specific contract* they would have obtained" but for the defendant's alleged wrongful conduct, the plaintiffs' claim for tortious interference with prospective economic relations failed to state a claim upon which relief could be granted. *Id.* at 23 (emphasis added).[8] Rescuecom's allegation, averred only on information and belief, that it "would have realized additional sales, franchisees, customers and revenues" from unidentified

[8] *See also Herlihy v. Metropolitan Museum of Art,* 160 Misc. 2d 279, 288 (Sup. Ct. N.Y. Co. 1994) (tortious interference with prospective business relations requires showing that "defendants intentionally interfered with a *known business relationship*" (emphasis added)), *aff'd as modified*, 214 A.D. 2d 106 (1st Dep't 1995).

consumers but for the complained-of conduct (Compl. ¶ 89), is insufficient as a matter of law.[9]

Moreover, Rescuecom's tortious interference claim presupposes that the selection by Google's advertisers of Rescuecom's mark as a keyword trigger for ads is a wrongful act. For the reasons explained above, regarding Rescuecom's first five counts, that is not so. Rescuecom has thus also failed adequately to allege the third element of a tortious interference claim.

Because Rescuecom has not alleged and cannot allege a specific lost business relationship, and because the conduct at issue is not wrongful, Rescuecom's tortious interference with prospective economic advantage claim must be dismissed.

III. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court dismiss Rescuecom's entire Complaint with prejudice.

Dated: New York, New York
October 19, 2005

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[9] *Hannex Corp. v. GMI, Inc.*, 140 F.3d 194 (2d Cir. 1998), cited by Rescuecom, is inapposite. (*See* Opp. at 21). While the Second Circuit held that, in certain instances, a cause of action may arise without an identified contract, a plaintiff in such instances must show that the defendant interfered with a "continuing business or other customary relationship." *Id.* at 205. In *Hannex*, the Court found such a relationship existed because plaintiff was a distributor for a third-party manufacturer, then lost that business when the defendant signed an exclusive distributorship agreement with the manufacturer. *Id.* Rescuecom's allegation of lost prospective business with unascertainable customers bears no resemblance to these facts.

DECLARATION OF SERVICE

Raymond E. Galbraith, hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that:

I am a Litigation Paralegal at the firm of Hunton & Williams LLP, attorneys for Defendant Google, Inc.

That on October 19, 2005, I served a true copy of the foregoing Reply Memorandum of Law in Further Support of Defendant Google, Inc.'s Motion to Dismiss on counsel for Plaintiff, via the Court's ECF System, at the address listed below

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 19, 2005.

/s/ Raymond E. Galbraith
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